

Claimant appealed the March 8, 2006, Award on the sole issue of her entitlement to additional weeks of temporary total disability benefits. Claimant argues her award of

compensation should include temporary total disability benefits for the period from October 15, 2001, through May 16, 2005. Accordingly, claimant requests the Board to modify her award to include those additional weeks.

Conversely, respondent and its insurance carrier contend the Award should be affirmed. They argue claimant is not entitled to receive temporary total disability compensation for the period requested as the record does not support claimant's contention she was temporarily and totally disabled during that period.

The only issue raised on this appeal is whether claimant is entitled to receive temporary total disability benefits for the period from October 15, 2001, through May 16, 2005.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified to award claimant temporary total disability benefits for an additional 18 weeks, which represents the recovery period following two right knee surgeries.

There is no dispute claimant fell at work and injured her right knee. The parties stipulated claimant's date of accident was December 8, 2000, and that her accident arose out of and in the course of her employment with respondent.

Despite that right knee injury and an earlier back injury, which is not related to this claim, claimant continued working for respondent. In January 2001, claimant underwent back surgery. And in April 2001 she resumed her employment with respondent.

Claimant's right knee symptoms continued. And in late May 2001 Dr. David J. Clymer, who is a board-certified orthopedic surgeon, performed right knee arthroscopic surgery on claimant to repair a medial meniscus tear. On October 15, 2001, Dr. Clymer released claimant to light duty activities for two weeks to be followed by no restrictions. When the doctor released claimant from treatment in late November 2001, he believed she had reached maximum medical improvement and he placed no restrictions on her activities. Dr. Clymer, however, believed claimant might eventually require a total knee replacement. The doctor did not see claimant again until May 2005, when he evaluated claimant for purposes of this claim. Despite continuing to use crutches since her May 2001 surgery, Dr. Clymer concluded claimant was able to work but that she should avoid repetitive kneeling, squatting, and climbing.

Following her arthroscopic surgery, claimant resumed her employment with respondent performing light duty. But in October 2001, respondent advised claimant it was

downsizing and terminated her employment. Claimant last worked for respondent in mid-October 2001. She has not worked anywhere since October 2001. But in 2002 claimant began receiving Social Security disability benefits. And she turned 65 in March 2006.

After being released from treatment by Dr. Clymer, in approximately April 2002 claimant sought additional medical care for her right knee. The insurance carrier authorized Dr. Stechschulte, who prescribed physical therapy, a brace, and medication. Claimant last saw Dr. Stechschulte in 2003. Claimant discussed knee replacement surgery with Dr. Stechschulte but she was frightened to have that surgery. At some point in her treatment, claimant also received injections in her knee from a Dr. Worsing. But those injections were not helpful.

Claimant next saw Dr. Bohn. On September 5, 2003, the doctor operated on claimant's right knee and installed a unispacer. The unispacer did not resolve claimant's right knee pain and in July 2004 claimant underwent a total knee replacement. Following that surgery, claimant had therapy twice a week. Unfortunately, the knee replacement did not resolve claimant's symptoms as she continues to have constant pain, which affects the way she walks, her ability to climb stairs and squat. Claimant last saw Dr. Bohn in August 2005. The record is not clear how long Dr. Bohn wanted claimant to remain off work following those surgeries. Moreover, claimant testified she did not know when her various doctors took her off work between October 2001 and her May 2005 visit with Dr. Clymer.

In addition to seeing the doctors mentioned above, claimant was examined on one occasion by Dr. Theodore L. Sandow, Jr.,<sup>1</sup> at the Judge's request and on three occasions by Dr. Edward J. Prostic at her attorney's request.

Claimant's request for the additional weeks of temporary total disability benefits is centered upon Dr. Edward J. Prostic's testimony. Neither Dr. Worsing, Dr. Stechschulte, Dr. Bohn, nor Dr. Sandow testified in this claim. Dr. Prostic, who is a board-certified orthopedic surgeon, saw claimant on three occasions – April 16, 2002; April 1, 2003; and March 15, 2004 – before she underwent her total knee replacement. At all three visits, Dr. Prostic thought claimant was temporarily and totally disabled as she needed a total knee replacement. Nonetheless, Dr. Prostic determined claimant was better at their second meeting and thought she could perform sedentary activities as long as she was not required to sit for a prolonged period, which was a restriction related to her chronic back problems. And as far as her knee was concerned, at all three visits the doctor believed

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<sup>1</sup> Judge Hursh excluded Dr. Sandow's functional impairment opinion from the record. The parties did not raise that as an issue for the Board to address. Consequently, Dr. Sandow's opinion is not part of the record for this appeal.

claimant could have worked sitting down. More importantly, Dr. Prostic testified most people are totally disabled for six to 12 weeks after total knee replacement surgery.

Temporary total disability is defined by K.S.A. 44-510c(b)(2), which provides:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

Considering claimant's testimony and the opinions from the various physicians, the Board concludes claimant has failed to prove that she was temporarily and totally disabled for the entire 187.14 weeks between October 15, 2001, when she last worked for respondent, and May 16, 2005, when she last saw Dr. Clymer.

In October 2001, Dr. Clymer released claimant to work light duty for two weeks to be followed by no restrictions. And in November 2001, the doctor released claimant with no restrictions. Although claimant's right knee was symptomatic she was able to perform light duty work for respondent after her May 2001 arthroscopic surgery. And even claimant's expert medical witness, Dr. Prostic, indicated claimant generally was able to perform sedentary work as long as she was not required to sit too long.

Claimant requests additional temporary total disability benefits for approximately three and one-half years. During such an extended period, it would not be unusual for an injured worker's condition and, thus, her or his ability to work to fluctuate. And in this instance claimant's ability to work did wax and wane. The Board finds claimant was unable to work following her September 5, 2003, right knee surgery and her July 20, 2004, total knee replacement. Based upon the testimony of Dr. Prostic regarding the recovery period for knee surgery, the Board finds and concludes that claimant should receive nine weeks of temporary total disability benefits for the period following both surgeries. Accordingly, the Board awards claimant an additional 18 weeks of temporary total disability benefits.

### **AWARD**

**WHEREFORE**, the Board modifies the March 8, 2006, Award.

M. Annette Shafer is granted compensation from BE Aerospace, Inc., and its insurance carrier for a December 8, 2000, accident and resulting disability. Before October 15, 2001, based upon an average weekly wage of \$400.92, Ms. Shafer is entitled to receive 5 weeks of temporary total disability benefits at \$267.29 per week, or \$1,336.45, plus 39.29 weeks of permanent partial disability benefits at \$267.29 per week, or \$10,501.82. Commencing October 15, 2001, based upon an average weekly wage of \$447.36, Ms. Shafer is entitled to receive 20 weeks of temporary total disability benefits at \$298.25 per week, or \$5,965, plus 25.46 weeks of permanent partial disability benefits at \$298.25 per week, or \$7,593.45. The total award is \$25,396.72 for a 37 percent disability to the leg, which is all due and owing less any amounts previously paid.

The record does not contain a fee agreement between claimant and her attorney. K.S.A. 44-536 requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the Judge for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant  
Jennifer Arnett, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director